Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

CHEMTURA CANADA CO./CIE (formerly known as CROMPTON CO./CIE, formerly known as UNIROYAL CHEMICAL LIMITED),

Cross-Petitioner,

v.

UNITED STATES OF AMERICA,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit erred in holding – contrary to the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits – that an entity that exercised no control over the disposal or treatment of hazardous substances, and had neither the authority nor the opportunity to control the disposal or treatment of hazardous substances, may nevertheless be held liable as one that "arranged for" the disposal or treatment of hazardous substances under § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*

2. Whether retroactive application of § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, to impose unforeseeable joint-and-several liability for over $110 million based on lawful, non-negligent conduct involving only about $1.5 million in transactions violates the Fifth Amendment to the United States Constitution.

3. Whether inflexible application of the cancer potency factor for dioxin used by the Environmental Protection Agency constitutes the enactment of a legislative rule without notice and comment contrary to the Administrative Procedure Act, 5 U.S.C. § 553.

CORPORATE DISCLOSURE STATEMENT

Chemtura Canada Co./Cie, formerly known as Crompton Co./Cie, formerly known as Uniroyal Chemical Limited, is wholly owned by Crompton European Holdings B.V., a Dutch company, and is indirectly wholly owned by Chemtura Corporation, whose stock is publicly traded on the New York Stock Exchange.

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Chemtura Canada Co./Cie, formerly known as Crompton Co./Cie, formerly known as Uniroyal Chemical Limited ("Uniroyal"), conditionally cross-petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Uniroyal's related petition for a writ of certiorari was docketed in this Court as Case No. 06-853.

OPINIONS BELOW

Pursuant to Supreme Court Rule 14(i), Uniroyal reproduced the relevant opinions of the Court of Appeals and United States District Court for the Eastern District of Arkansas in its petition for a writ of certiorari docketed as Case No. 06-853. *United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001) (Appendix C); *United States v. Vertac Chemical Corporation*, 453 F.3d 1031 (8th Cir. 2006) (Appendix A); *United States v. Vertac Chemical Corporation*, 966 F. Supp. 1491 (E.D. Ark. 1997) (Appendix E); *United States v. Vertac Chemical Corporation*, 33 F. Supp.2d 769 (E.D. Ark. 1998) (Appendix D); and *United States v. Vertac Chemical Corporation*, 364 F. Supp.2d 941 (E.D. Ark. 2005) (Appendix B).

JURISDICTION

The Court of Appeals filed its opinion on July 13, 2006. The Court of Appeals denied a timely petition for rehearing and rehearing *en banc* on September 19, 2006. Hercules Incorporated's petition for a writ of certiorari was docketed on December 21, 2006. Uniroyal files this petition within 30 days of December 21, 2006. This Court has jurisdiction under 28 U.S.C. § 1254 and Rule 12.5 of the Rules of the Supreme Court, and this cross-petition is conditional upon this Court's grant of Hercules Incorporated's petition for a writ of certiorari.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act provides, in pertinent part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—. . . (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by another party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . shall be liable . . . .

42 U.S.C. § 9607(a).

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 533 of the Administrative Procedure Act provides, in pertinent part:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. . . .

* * * *

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. . . .

5 U.S.C. §§ 553(b), (c).

STATEMENT OF THE CASE

This petition arises from actions brought by the United States, the State of Arkansas, and Hercules Incorporated ("Hercules") against Uniroyal, culminating in a judgment of joint-and-several liability for over $110 million under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* The District Court originally had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1335, 42 U.S.C. § 6973, and 33 U.S.C. § 1345. The District Court had subject-matter jurisdiction over claims later added under 42 U.S.C. §§ 9607 and 9613. The Court of Appeals had jurisdiction over the relevant appeals under 28 U.S.C. § 1291.

The United States initially developed the Vertac Chemical Corporation ("Vertac") site in Jacksonville, Arkansas, as a munitions factory in the 1930s. The site was sold in the 1940s to Reasor-Hill Corporation ("Reasor-Hill"), now a defunct company. Reasor-Hill began manufacturing phenoxy herbicides, including trichlorophenoxyacetic acid ("2,4,5-T"), at the site in 1958. In 1961, Hercules bought the site, and, in 1974, Hercules leased the site to Transvaal, Inc., the predecessor to Vertac. Vertac bought the site from Hercules in 1976. Hercules produced 2,4,5-T at the site from 1961 to 1970. Vertac produced 2,4,5-T at the site from 1971 until 1979. Site operators produced the other principal

product manufactured at the site, dichlorophenoxyacetic acid ("2,4-D"), from 1958 until 1986. *See United States v. Vertac Chem. Corp.*, 453 F.3d 1031, 1036-38 (8th Cir. 2006).

In 1980, the United States Environmental Protection Agency ("EPA") sued Vertac and Hercules for an injunction against the discharge of hazardous waste at the site. *United States v. Hercules, Inc.*, 247 F.3d 706, 713 (8th Cir.), *cert. denied*, 534 U.S. 1065 (2001). "The Arkansas Department of Pollution Control and Ecology sought similar relief under state law." *Id.* "Several years later, the [District Court] approved consent decrees representing a negotiated remedial plan to address the containment and monitoring of waste." *Id.* (citing *United States v. Vertac Chem. Corp.*, 588 F. Supp. 1294, 1296-97 (E.D. Ark. 1984)). "The lawsuit was later converted into" an action under CERCLA. *Id.*

> Although Vertac stipulated that it was an owner and operator of the site liable to the government for response costs under CERCLA, it ultimately failed to comply with the consent decrees and eventually sold its assets to third parties, forcing the [District Court] in 1987 to appoint a receiver to handle the company's affairs.

Id. (citing *United States v. Vertac Chem. Corp.*, 671 F. Supp. 595, 623-24 (E.D. Ark. 1987), *vacated*, 855 F.2d 856 (8th Cir. 1988) (table); *United States v. Vertac Chem. Corp.*, 756 F. Supp. 1215 (E.D. Ark. 1991), *aff'd*, 961 F.2d 786 (8th Cir. 1992)). "In an effort to identify all those potentially liable for environmental harm at the site, numerous additional parties, including the United States Department of Defense, were brought into the suit." *Id.* "These parties filed various cross-claims, counterclaims, and third party complaints; many of the parties settled [for a few million dollars] and entered into consent decrees." *Id.* at 713-14.

The Court of Appeals summarized the pertinent facts as to Uniroyal:

> Uniroyal was one of Vertac's customers and purchased 2,4,5-T and other products from Vertac in the 1970s. In 1978, Vertac informed Uniroyal that it lacked the funds to purchase enough 1,2,4,5-tetrachlorobenzene (TCB), a key ingredient in the manufacture of 2,4,5-T, to fulfill its contractual obligations to Uniroyal. Uniroyal agreed to supply Vertac with enough TCB to create some 1.3 million pounds of 2,4,5-T that was to be shipped back to Uniroyal. Vertac did not purchase the TCB directly from Uniroyal, but instead reduced the amount it charged Uniroyal for the 2,4,5-T to reflect the value of the TCB that Uniroyal had supplied. This arrangement was embodied in two separate contracts and was carried out between March 1978 and March 1979. The 2,4,5-T that was produced with Uniroyal's TCB represents less than one percent of the more than 150 million pounds of 2,4-D and 2,4,5-T that were manufactured at the site over the course of its operation.

Vertac, 453 F.3d at 1038. The District Court found that Uniroyal owned the TCB throughout the manufacturing process. The Court of Appeals upheld that finding as not "clearly erroneous." *Hercules*, 247 F.3d at 721.

Notwithstanding the issue of ownership, the parties stipulated in the District Court that Uniroyal exercised no control over Vertac's manufacture of 2,4,5-T or over the operation of the site. The District Court found that "Uniroyal was in no position to manage the disposal of any hazardous materials." *United States v. Vertac Chem. Corp.*, 79

F. Supp.2d 1034, 1040 (E.D. Ark. 1999), *vacated on other grounds*, 247 F.3d 706 (8th Cir.), *cert. denied*, 534 U.S. 1065 (2001). No one ever challenged that factual finding on appeal. Former employees and officers of Vertac testified that Uniroyal had no authority to control Vertac's operations. That Uniroyal did not have the authority or opportunity to control the disposal or treatment of hazardous substances at the Vertac site was implicit in the decisions of the District Court and the Court of Appeals. *See United States v. Vertac Chem. Corp.*, 966 F. Supp. 1491 (E.D. Ark. 1997), *aff'd in part and rev'd in part*, 247 F.3d 706 (8th Cir.), *cert. denied*, 534 U.S. 1065 (2001).

Although Uniroyal never had the opportunity to control any aspect of Vertac's disposal or treatment of any hazardous substances, the District Court found Uniroyal liable as an entity that "arranged for" the disposal or treatment of hazardous substances under CERCLA § 107(a)(3), holding that "actual control [is] not necessary for arranger liability." *Vertac Chem. Corp.*, 966 F. Supp. at 1501. Uniroyal challenged that decision on appeal, but the Court of Appeals affirmed. *Hercules*, 247 F.3d at 720; *Vertac*, 453 F.3d at 1047.

Uniroyal also argued that retroactive application of CERCLA on the facts of this case violated the Due Process and Takings Clauses of the Fifth Amendment to the United States Constitution because Uniroyal's liability was unforeseeable and substantially disproportionate to Uniroyal's conduct. The Court of Appeals initially recognized that inquiry into the constitutionality of CERCLA in this case would be "essentially ad hoc and fact intensive." *Hercules*, 247 F.3d at 722 (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion)). However, the Court of Appeals ultimately rejected Uniroyal's as-applied constitutional challenge without any analysis of the facts of the case. *Vertac*, 453 F.3d at 1047-48.

To calculate the dioxin cleanup standards for the soil and sediments at the Vertac site, EPA used an inflexible and conservative cancer potency factor that amounted to an administrative rule. Although EPA's rule regarding the cancer potency factor of dioxin was never subject to notice and comment, the Court of Appeals held EPA's action lawful, opining that EPA's rule was merely a technical and advisory report. *Vertac*, 453 F.3d at 1046.

Uniroyal first asks this Court to resolve a split among the Courts of Appeals concerning the standard for imposing "arranger liability" under CERCLA. Here, the Eighth Circuit – contrary to the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits – held an entity that exercised no control over the disposal or treatment of hazardous substances, and possessed neither the authority nor the opportunity to control the disposal or treatment of hazardous substances, liable as one that "arranged for" the disposal or treatment of hazardous substances. This cross-petition thus raises an important issue that was decided by the Court of Appeals in a manner that conflicts with the decisions of other Courts of Appeals. This Court should resolve that conflict. Sup. Ct. R. 10(a).

Uniroyal next asks this Court to decide whether retroactive application of CERCLA to impose unforeseeable, staggering joint-and-several liability that is disproportionate to the actor's lawful, non-negligent conduct violates the Fifth Amendment to the United States Constitution. The transactions at issue between Uniroyal and Vertac involved approximately $1.5 million, yet the Court of Appeals' decision could result in the imposition of liability on Uniroyal for over $110 million in remediation costs. This cross-petition raises an important federal question that was decided by the Court of Appeals in conflict with the decisions of this Court. This Court should address that question. Sup. Ct. R. 10(c).

Finally, Uniroyal asks this Court to decide whether EPA's inflexible application of its cancer potency factor for dioxin constitutes a legislative rule that was not subject to notice and comment as required by the Administrative Procedure Act. Application of EPA's rule creates over $100 billion in liability across the nation. The Eighth Circuit's opinion that EPA's rule is not subject to notice and comment conflicts with the decisions of other Courts of Appeals. This Court should resolve that conflict. Sup. Ct. R. 10(a).

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Interpretation Of CERCLA Arranger Liability Conflicts With The Statutory Language And The Decisions Of Other Courts Of Appeals.[1]

Section 107(a)(3) of CERCLA imposes liability on "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances . . . owned or possessed by such person . . . ." 42 U.S.C. § 9607(a)(3). For arranger liability to attach, a person must both "own[] or possess[]" hazardous substances and "arrange[] for" their disposal or treatment. *Id.* "CERCLA does not define the phrase 'arranged for.'" *South Florida Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996) (internal citations omitted); *see also United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) (same); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (same), *cert. denied*, 510 U.S. 1044 (1994). CERCLA's legislative history provides little guidance in determining the meaning of these words. *Montalvo*, 84 F.3d at 406 n. 6; *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 n. 8 (8th Cir. 1989). "Congress has left

1. Uniroyal presented this issue in its related petition for a writ of certiorari docketed in this Court as Case No. 06-853.

this task to the courts, and the courts have at times struggled with the contours of 'arranger liability' under § 107(a)(3)." *Montalvo*, 84 F.3d at 406.

The parties stipulated that Uniroyal exercised no control over the manufacture of 2,4,5-T or over the operation of the Vertac site. The District Court found that "Uniroyal was in no position to manage the disposal of any hazardous materials." *Vertac*, 79 F. Supp.2d at 1040. Nonetheless, both the District Court and the Court of Appeals held Uniroyal liable as an arranger, reasoning that Uniroyal owned the TCB throughout Vertac's manufacturing process and that control is not "necessary" to expose a person to arranger liability. *Vertac*, 966 F. Supp. at 1501; *Hercules*, 247 F.3d at 720. The holding that control is unnecessary conflicts with the plain language of § 107(a)(3), which requires that a person both "owned or possessed" the hazardous substances and "arranged for" their disposal or treatment. *See Morton Intern., Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 676-77 (3d Cir. 2003). The Court of Appeals read the words *arranged for* out of § 107(a)(3) and rendered this central language of the statute superfluous.

The Courts of Appeals have adopted differing standards for the imposition of CERCLA arranger liability. The Third Circuit recognized:

> Almost all of our sister circuit courts have adopted a standard for "arranger liability," but the standards adopted vary. *See Geraghty and Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 929 (5th Cir. 2001), *cert. denied*, 533 U.S. 950, 121 S.Ct. 2592, 150 L.Ed.2d 751 (2001); *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999); *Pneumo Abex Corp. v. High Point, Thomasville and Denton R.R. Co.*, 142 F.3d 769, 775 (4th Cir.

> 1998); *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227, 1231-32 (6th Cir. 1996); *South Florida Water Management District v. Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996); *Amcast Industrial Corporation v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993); *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 695 (9th Cir. 1992); *United States v. Aceto Agricultural Chems. Corp.*, 872 F.2d 1373, 1381-82 (8th Cir. 1989).

Morton, 343 F.3d at 676-77.

Even before the decisions below, the Eighth Circuit had advanced the most liberal interpretation of the words *arranged for*. *See Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1523 (D. Colo. 1996) (citing *Aceto*, 872 F.2d at 1378-82). In *Aceto*, the Court of Appeals emphasized that, because of an allegation of ownership, it was reasonable to infer from the complaint that the defendants had the authority to control the waste-disposal practices at issue. 872 F.2d at 1383. However, in the case at bar, the Court of Appeals discounted the importance of that conclusion. Despite the fact that, in *Aceto*, there was no meaningful difference between the CERCLA claim and the claim under the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 *et seq.* ("RCRA"), the Court of Appeals below reasoned:

> Although we stated in *Aceto* that "it may be reasonably inferred that [defendants] had the authority to control the way in which the pesticides were formulated," . . . this observation came as part of our discussion of RCRA and was not necessary to our prior conclusion that the complaint stated a valid claim under CERCLA. Indeed, in the portion of *Aceto* that discussed

> CERCLA, we specifically rejected the defendants' contention that control is required in every circumstance. To support their argument, the defendants in *Aceto* quoted *NEPACCO*, 810 F.2d at 743, for the proposition that they should "escape liability because they had no authority to control" the formulation and disposal process .... We distinguished *NEPACCO* by observing that a finding of control had been necessary in that case only because ownership was lacking .... The *Aceto* defendants, however, unlike those in *NEPACCO*, "actually owned the hazardous substances, as well as the work in process," ... and thus an arguable absence of control did not mandate dismissal of the complaint. Control, therefore, is not a necessary factor in every case of arranger liability ....

Hercules, 247 F.3d at 720 (internal citations omitted).

Holding that the imposition of arranger liability does not require a finding of control, the Court of Appeals departed from its earlier interpretation of CERCLA arranger liability. The Court of Appeals had unequivocally stated,

> We agree ... that, in the wake of [*United States v. Gurley*, 43 F.3d 1188 (8th Cir.1994),] and [*United States v. Vertac Chemical Corporation*, 46 F.3d 803 (8th Cir. 1995)], a finding of arranger liability requires some level of actual participation in, or exercise of control over, activities that are causally connected to, or have some nexus with the arrangement for disposal of hazardous substances or the off-site disposal itself.

United States v. TIC Inv. Corp., 68 F.3d 1082, 1087-88 (8th Cir. 1995). Indeed, in an earlier appeal in this very case, the Court of Appeals held that the United States Department of Defense was not liable for any response costs because it did not control the disposal of hazardous substances. *Vertac*, 46 F.3d at 809. The Court of Appeals' current standard for arranger liability, as articulated below, reaches much further than these earlier cases.

Numerous Courts of Appeals have rejected the Eighth Circuit's approach. At the other end of the spectrum, the United States Court of Appeals for the Second Circuit held:

> Congress employed traditional notions of duty and obligation in deciding which entities would be liable under CERCLA as arrangers for the disposal of hazardous substances. Accordingly, this court concludes that it is the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision.

General Elec. Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 286 (2d Cir. 1992) (emphasis in original). The Second Circuit observed that "courts have found that ownership of hazardous substance, when combined with actual control over the process that generates the hazardous waste, supports arranger liability." *Id.* at 287. In the Second Circuit, even "the opportunity or ability to control a third-party's waste disposal practices" does not suffice to hold a person "liable as an entity that 'otherwise arranged for' disposal or transport of hazardous waste." *Id.* at 286. The United States Court of Appeals for the Fifth Circuit cited the Second Circuit's opinion with approval. *See Geraghty and Miller, Inc. v.*

Conoco, Inc., 234 F.3d 917, 929 (5th Cir. 2000), *cert. denied*, 533 U.S. 950 (2001).

Likewise, the United States Court of Appeals for the Third Circuit has explained, "Ownership or possession of the hazardous substance must be demonstrated, but this factor alone will not suffice to establish liability. A plaintiff must also demonstrate either control over the process that results in a release of hazardous waste or knowledge that such a release will occur during the process." *Morton,* 343 F.3d at 677-78.

Using the Eighth Circuit's earlier cases, the United States Court of Appeals for the Ninth Circuit expressed its view as follows:

> To summarize our view of *Aceto* and *NEPACCO*, and to assess the interrelationship of the factors of ownership, possession, and control over waste disposal, we can do no better than to quote from Judge Levi's careful opinion in *United States v. Iron Mountain Mines, Inc.*, 881 F.Supp. 1432 (E.D. Cal. 1995). He writes:
>
> > It is true that some cases impose arranger liability on parties who did not literally own or physically possess hazardous waste at the time it was disposed of or released. But in each of these cases the party either was the source of the pollution or managed its disposal by the arranger [citing numerous cases, including *Aceto* and *NEPACCO*].
> >
> > No court has imposed arranger liability on a party who never owned or

> possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue. *See, e.g., General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) ("it is the obligation to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision") (emphasis in original).

United States v. Shell Oil Co., 294 F.3d 1045, 1058-59 (9th Cir. 2002).

The United States Court of Appeals for the Eleventh Circuit interpreted the Eighth Circuit's decision in *Aceto* as Uniroyal did. The Eleventh Circuit rejected the plaintiffs' reliance on *Aceto* in *South Florida Water Management District v. Montalvo*, 84 F.3d 402 (11th Cir. 1996). The *Montalvo* panel noted that, in *Aceto*, the Eighth Circuit had concluded that "it was possible to infer the manufacturers exercised some control over the formulator's mixing process." *Id.* at 408. The Eleventh Circuit found that the *Montalvo* plaintiffs had not alleged that the defendants "had sufficient knowledge of or control over plaintiffs' disposal practices to be held liable" as "arrangers" for the disposal of hazardous substances. *Id.* at 409. And the United States Court of Appeals for the Eleventh Circuit has ruled,

> If Congress wishes to impose liability on parties who contract for services that produce hazardous waste, it, not us, has the authority to do so. We emphasize, however, that our opinion does not

> foreclose the possibility that a party could so control and benefit from another company's production of hazardous waste that arranger liability would arise under 42 U.S.C. § 9607(a)(3).

Concrete Sales and Servs., Inc. v. Blue Bird Body Co., 211 F.3d 1333, 1339 (11th Cir. 2000). *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) ("The words ['arranged for'] imply intentional action. The only thing that Detrex arranged for Transport Services to do was to deliver TCE to Elkhart's storage tanks. It did not arrange for spilling the stuff on the ground."), *cert. denied*, 510 U.S. 1044 (1994).

The United States Court of Appeals for the Tenth Circuit applied this Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), which defined the standard for "operator liability" to require one to "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations," to cases involving arranger liability. *Raytheon Constructors, Inc. v. Asarco, Inc.*, 368 F.3d 1214, 1217 (10th Cir. 2003).

If the United States had brought this case in the Second, Third, Fifth, Seventh, Ninth, Tenth, or Eleventh Circuit, Uniroyal likely would not have been held liable under CERCLA as one that "arranged for" the disposal or treatment of hazardous substances. At the same time, in addition to the Eighth Circuit, the United States Court of Appeals for the Sixth Circuit imposes arranger liability in the absence of a finding of control. The Sixth Circuit held that "a party can be responsible for 'arranging for' disposal, even when it has no control over the process leading to the release of substances." *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996). The appropriate inquiry,

according to the Sixth Circuit, "is whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances." *Id.* at 1231.

The Courts of Appeals' differing standards for the imposition of CERCLA arranger liability generate confusion and inequity in the marketplace. While the Second Circuit requires an obligation to control the disposal or treatment of hazardous substances to impose arranger liability, the Eighth Circuit held Uniroyal liable as an arranger despite the absence of even the opportunity to control the disposal or treatment of hazardous substances. Liability for environmental cleanup costs is often staggering: Here, the judgment potentially exposes Uniroyal to liability for over $110 million. This Court should resolve the split among the Circuit Courts of Appeals and provide a uniform standard for the imposition of CERCLA arranger liability.

II. The Court Of Appeals' Opinion Imposes Unforeseeable Joint-And-Several Liability For Over $110 Million Based On Lawful, Non-Negligent Conduct Involving Only About $1.5 Million In Transactions In Violation Of The Fifth Amendment To The United States Constitution.[2]

The Court of Appeals rejected Uniroyal's as-applied challenge to CERCLA's constitutionality on the ground that it had previously rejected challenges to CERCLA's constitutionality. *Vertac*, 453 F.3d at 1047-48. The Court of Appeals ruled that the retroactive application of CERCLA is never unconstitutional, even when a retroactive application imposes severe liability on a limited class of parties that could not have anticipated the liability and the liability is substantially disproportionate to the parties' experience and settled expectations.

2. Uniroyal presented this issue in its related petition for a writ of certiorari docketed in this Court as Case No. 06-853.

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). The retroactive application of legislation that imposes unexpected, severe, and disproportionate liability violates the Fifth Amendment to the United States Constitution. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265. The "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Id.* (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). CERCLA does not expressly provide for retroactivity, and Uniroyal's activities giving rise to CERCLA liability in this case predated CERCLA and were lawful and non-negligent. Nonetheless, Uniroyal was unexpectedly held jointly and severally liable for over $110 million in CERCLA response costs.

In *Eastern Enterprises*, this Court held the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701-22, unconstitutional as applied to impose retroactive liability on a company to pay health benefits to over 1,000 of its former employees. Although there was no single opinion for the Court, Justice O'Connor, writing for a plurality that included Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, distilled three factors of "particular significance" from prior cases: "The economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Eastern Enters.*, 524 U.S. at 523; *see also Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979). The plurality opined that, while several prior cases had upheld retroactive statutes, their imposition of retroactive liability

was "confined to short and limited periods required by the practicalities of producing national legislation." *Eastern Enters.*, 524 U.S. at 526. The plurality concluded that the Takings Clause of the Fifth Amendment forbids the application of a statute in a particular case if the law "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and [if] the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528-29.

Justice Kennedy, concurring in the judgment and dissenting in part, agreed that the Coal Act, as applied to Eastern Enterprises, was arbitrary and therefore unconstitutional. Justice Kennedy rested his decision on the Due Process Clause of the Fifth Amendment rather than on the Takings Clause. That said, Justice Kennedy stated that he was "in full accord with many of the plurality's conclusions[.]" *Id.* at 539. He agreed that "[t]he plurality's careful assessment of the history and purpose of the statute in question demonstrates the necessity to hold it arbitrary and beyond the legitimate authority of the Government to enact." *Id.*

The four dissenters likewise recognized that retroactive application of a federal statute may be unconstitutional under the Due Process Clause of the Fifth Amendment. The dissenters explained that, "like the plurality," they "would inquire if the law" as applied retroactively was "fundamentally unfair or unjust." *Id.* at 558 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting). "[T]he Due Process Clause can offer protection against legislation that is unfairly retroactive[,] for . . . a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary." *Id.* at 557. The dissent noted that the same three factors articulated by the plurality could properly be applied in the due process, rather than takings, context.

Id. (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986)). The dissenters concluded that, on the facts before them, retroactive application of the Coal Act to Eastern Enterprises was not fundamentally unfair or unjust. But every Justice in *Eastern Enterprises* agreed with the core proposition that "an unfair retroactive assessment of liability upsets settled expectations, and . . . thereby undermines a basic objective of law itself." *Id.* at 558 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *compare id.* at 532 (plurality) ("Retroactivity is generally disfavored in the law, in accordance with fundamental notions of justice that have been recognized throughout history") (internal quotation marks and citations omitted); *id.* at 547 (Kennedy, J., concurring in the judgment) ("for centuries our law has harbored a singular distrust of retroactive statutes").

Some courts, including the Court of Appeals below in one opinion, have recognized that *Eastern Enterprises* can provide a basis to challenge a retroactive application of CERCLA. *See, e.g., Hercules*, 247 F.3d at 722 (stating that "inquiry into the constitutionality of CERCLA . . . would be 'essentially ad hoc and fact intensive'") (quoting *Eastern Enterprises*); *Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp.2d 1094, 1111 (D. Idaho 2003) ("Defendants' argument that the retroactive application of CERCLA in this case is a taking or in violation of the due process clause of the Constitution as discussed in *Eastern Enterprises* [] is reserved until the dollar amount of the damages is established in the second phase of the trial."). Other courts have refused to apply *Eastern Enterprises* to evaluate the constitutionality of the retroactive application of CERCLA on the ground that the decision has no precedential effect. *See, e.g., United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) ("The only binding aspect of [*Eastern Enterprises*] is its specific result, and so the authority of *Eastern Enterprises* is confined to its holding that the Coal Act is unconstitutional as applied to Eastern Enterprises."); *Franklin County Conv.*

Facilities v. American Premier, 240 F.3d 534, 552 (6th Cir. 2001) (holding that "*Eastern Enterprises* has no precedential effect [on the retroactive application of CERCLA] because no single rationale was agreed upon by the Court").

The judgment in this case holds Uniroyal jointly and severally liable for over $110 million in response costs as a result of lawful, non-negligent conduct involving only $1.5 million in transactions. As the District Court recognized, "Uniroyal and Hercules are left 'holding the bag' for Vertac, who at least arguably caused the greatest amount of harm." *Vertac*, 79 F. Supp.2d at 1036. Retroactive application of CERCLA can result in this sort of large-scale, unexpected liability and thereby undermine the "free, dynamic society" that is "fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 266. The Court of Appeals' ruling that the retroactive application of CERCLA is never susceptible to an as-applied constitutional challenge fails to address this Court's opinion in *Landgraf* and directly contradicts the views of all the Justices of this Court in *Eastern Enterprises*. This Court should decide whether the retroactive application of CERCLA can violate the Constitution and whether it does so as to Uniroyal in this case.

III. The Court of Appeals' Opinion Endorses EPA's Use Of Its Cancer Potency Factor For Dioxin As A Legislative Rule Without Providing Notice And The Opportunity To Comment In Conflict With § 553 Of The Administrative Procedure Act And Decisions Of Other Courts Of Appeals.[3]

The Administrative Procedure Act (the "APA") requires notice and the opportunity to comment before an agency can

3. Discussion of the Administrative Procedure Act in this section is borrowed and adapted from Hercules' petition for a writ of certiorari docketed in this Court as Case No. 06-865.

make a rule. 5 U.S.C. §§ 553(b), (c). In this case, EPA has created and applied its standard potency factor at every site requiring dioxin-affected remediation for the last 25 years. EPA considered its standard potency factor to be a rule in that it affirmatively stated that it would be "arbitrary and capricious" for EPA not to apply its standard potency factor. Thus, EPA summarily rejected all alternative potency factors proposed by affected parties. The Eighth Circuit held that EPA was exempt from the notice-and-comment requirements of the APA because EPA's potency factor was "at most only a technical and advisory report." *Vertac*, 453 F.3d at 1046.

The Eighth Circuit's decision is inconsistent with administrative law rulings in other circuits holding that an agency's uniform and inflexible practice creates a legislative rule and triggers the need for notice-and-comment rulemaking. The Eighth Circuit's reasoning that an agency can avoid rulemaking by purporting to consider comments, and then invariably reject them as contrary to agency policy, is inconsistent with this Court's admonition that "it is the substance of what the [agency] has purported to do and has done which is decisive." *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942).

The D.C. Circuit has explained that, if an agency "will automatically decline to entertain challenges to the statement's position, then the statement is binding." *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988). In *McLouth,* the D.C. Circuit rejected EPA's assertion that it did "not consider itself . . . bound" by a model used to predict levels of hazardous waste and that it "retained discretion to deviate from its use." *Id.* (internal quotation marks and citation omitted). The D.C. Circuit held that agency practice proved otherwise and that EPA had created a legislative rule requiring rulemaking. "More critically than EPA's language adopting the model, its later conduct applying

it confirms its binding character." *Id.* at 1321. The D.C. Circuit noted that EPA was "close-minded and dismissive in its denial of a delisting petition"; "the model is not just a 'musing[] about what the [agency] might do in the future'"; "EPA was simply unready to hear new argument"; and "EPA has evidenced almost no readiness to reexamine the basic propositions that make up the" model. *Id.* (citations omitted; brackets in original). The D.C. Circuit concluded that "[t]he model thus created a norm with 'present-day binding effect,'" even though EPA pointed to four out of 100 cases where it deviated from the model. *Id.* at 1321.

Similarly, the D.C. Circuit rejected an agency's claim that a schedule of penalties was a mere "policy statement" because the agency's practice showed that it "intend[ed] to use that framework to cabin its discretion." *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1233 (D.C. Cir. 1994). The court explained that a "policy statement" is merely "an indication of an agency's current position on a particular regulatory issue." *Id.* The court noted that "[t]he schedule of fines has been employed in over 300 cases and only in 8 does the Commission even claim that it departed from the schedule." *Id.* It was therefore a rule. Other Courts of Appeals agree. *Jerri's Ceramic Arts v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 208 (4th Cir. 1989) ("[T]he Commission has made a legislative rule and called it an interpretation."); *Nat'l Knitwear Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 666 F.2d 81, 83 (4th Cir. 1981) (holding that an agency's "characterization of its statement as an exposition of its policy or interpretation of the standard does not preclude our finding that it is something more.").

In *General Elec. Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002), the D.C. Circuit vacated an EPA "guidance document" with a cancer potency factor for polychlorinated biphenyls. The court held that the guidance document was a legislative

rule, not a policy statement, and therefore should have been issued only with the benefit of notice and comment as required by the APA. *Id.* at 383-85. This case involving a "guidance document" regarding the potency factor of dioxins is indistinguishable, and the Eighth Circuit's contrary ruling creates a circuit split.

EPA has used the potency factor to make a hidden policy choice and to impose over $100 billion in regulatory compliance costs across the nation. By labeling the self-enacted legislative rule as mere "guidance," EPA has evaded accountability for its policy choice, shielded itself from notice-and-comment rulemaking, and evaded judicial review. The Court should grant review to determine the lawfulness of a regulatory regime that permits EPA to set national policy without responding to public comment and judicial review.

CONCLUSION

For all these reasons, if the Court grants Hercules Incorporated's petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, the Court should also grant Uniroyal's cross-petition for a writ of certiorari.

Respectfully submitted,

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